CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 100

THE UNITED STATES OF AMERICA, PETITIONER

vs.

JIMMIE IRA BROWN

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED MAY 28, 1947
CERTIORARI GRANTED OCTOBER 13, 1947

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1405

THE UNITED STATES OF AMERICA, PETITIONER

vs.

JIMMIE IRA BROWN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

INDEX

1 [Caption omitted.]

2 In the District Court of the United States of America for the Western District of Missouri, Southwestern Division

No. 1933

UNITED STATES OF AMERICA, PLAINTIFF

vs.

JIMMIE IRA BROWN, HULAN CECIL RUTLEDGE, DEFENDANTS

Indictment

Filed Dec. 28, 1945.

The grand jurors of the United States of America, duly and legally chosen, selected, summoned, and drawn from the body of the Western District of Missouri, and duly and legally empanelled, sworn, and charged to inquire of and concerning crimes and offenses against the United States of America within the Western District of Missouri, upon their oaths present and charge that Jimmie Ira Brown and Hulan Cecil Rutledge, on or about the 2d day of November 1945, at a point upon United States Highway No. 71, being about two and one-half miles South of Sheldon, Missouri, in the Southwestern Division of the Western Judicial District of Missouri, and within the jurisdiction of this Court, they, the said Jimmie Ira Brown and Hulan Cecil Rutledge being then and there in the custody of the Attorney General of the United States under judgment of conviction and sentence for having violated a law of the United States, and being then and there in the personal custody of the United States Marshal for the Western Judicial District of Arkansas, who was acting under orders of the Attorney General of the United States and was conducting and carrying them, the said Jimmie Ira Brown and Hulan Cecil

3 Rutledge, from Eldorado, Arkansas, through the State of Missouri, along and upon said Highway enroute from Eldorado, Arkansas, to the United States penitentiary at Leavenworth, Kansas, did knowingly, wilfully, unlawfully, and feloniously attempt to escape from such said custody;

Contrary to the provisions of Section 753h, of Title 18, of the United States Code, and against the peace and dignity of the United States of America.

EARL A. GRIMES,
Assistant United States Attorney.

A true bill:

H. A. MILLER,
Foreman of the Grand Jury.

Filed in the United States District Court on Dec. 28, 1945.

4 In the District Court of the United States of America For the Western District of Missouri, Southwestern Division

Order appointing counsel; motion to abate and denial thereof; waiver of arraignment and pleas

January 15, 1946

Now on this day comes the United States Attorney for the plaintiff, and also come the defendants herein in person and it appearing to the court that the defendants are without counsel and are unable to procure the same, it is ordered by the Court that Justin Ruark, a member of this bar, be and he is hereby appointed as counsel for the defendants as in such case made and provided. The defendants move to abate prosecution and to dismiss the case. Said motion is argued by counsel for the defendants and submitted to the court and by the Court overruled. The defendants waive formal arraignment and enter pleas of not guilty, and for cause shown (claimed insanity) the court refuses to accept said plea as to defendant Brown, and enters plea of not guilty for said defendant. Defendant Rutledge moves for severance. The case is set for trial on January 18, 1946 at 10:00 a. m. The Court appoints Mr. A. H. Garner as counsel for defendant Rutledge.

5 District Court of the United States, Southwestern Division, Western District of Missouri

No. 1933

UNITED STATES

v.

JIMMIE IRA BROWN

Criminal Indictment in One-Count for Violation of U. S. C., Title 18, Sec. 753–h

Judgment and commitment.

Filed Jan. 17, 1946

On this 17th day of January 1946, came the United States Attorney, and the defendant Jimmie Ira Brown, appearing in proper person, and by counsel and,

The defendant having been convicted on his plea of guilty of the offense charged in the indictment in the above-entitled cause, to wit: Did knowingly, wilfully, unlawfully, and feloniously attempt to escape from the custody of a United States Marshal while en route from Eldorado, Arkansas, to the United States Penitentiary at Leavenworth, Kansas, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and adjudged that the defendant, having been found guilty of said offense, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of five (5) years to begin at the expiration of any sentence he is now serving, or to be served which was imposed prior to this date, without costs.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) ALBERT A. RIDGE,
United States District Judge.

Approved as to form:

SAM M. WEAR, *U. S. Attorney.*

Filed in the U. S. District Court on the 17th day of Jan. 1946.

6 District Court of the United States

[Title omitted.]

Motion to vacate and/or set aside judgment and sentence

Filed Feb. 19, 1946

To the Honorable ALBERT A. RIDGE, *United States District Judge:*

Now comes, Jimmie Ira Brown, hereinafter called petitioner, and motions this Honorable Court to vacate and/or set aside judgment and sentence of petitioner only, in cause United States vs. Jimmie Ira Brown, et al., which cause petitioner was sentenced to (5) five years imprisonment.

The judgment of the case was in violation of the amendments to the constitution of the United States.

The petitioner attempted to escape from a United States Deputy Marshall and a guard while in route from El Dorado, Ark., to the Federal Penitentiary at Leavenworth, Kans. And upon arrival

of petitioner at the said penitentiary, he was called before the Institutional Court and was charged with attempt to escape from a United States Deputy Marshall and a guard while in route from El Dorado, Ark., to the Federal Penitentiary at Leavenworth, Kansas. The petitioner had not been committed to any institution at the time he attempted to escape, therefore he was not subject to any rules and regulations of any penitentiary or prison or institution, but the institutional court appointed Mr. H. C. Burgess to act as the petitioner's attorney and the court held a
7 regular trial and forfeited 480 days of the petitioner's good time on December 10, 1945.

Then on January 17, 1946, the petitioner was sentenced to (5) five years' imprisonment in this Honorable Court for the "same identical offense." This Honorable Court appointed Mr. Justin Ruark, to act as the petitioner's attorney, and, upon request of the petitioner, he made an oral motion to dismiss the case on the grounds of double jeopardy. But the motion was overruled on the grounds that the good time which the petitioner forfeited was not a constitutional right, because, when a convict is confined at the Federal Hospital for the insane at Springfield, Missouri, he would not receive any deduction from his sentence for good conduct, the petitioner was not in any hospital for the insane, and, he had not been committed to any kind of institution when he attempted to escape, and, he has never been in any hospital for the insane. Therefore, it was his constitutional right to have a deduction made from his sentence for good conduct while in the penitentiary.

When a prisoner has complied with provisions statute relating to deductions from sentence for good conduct, a good time allowance so earned become a matter of right, and he is entitled to reduction of maximum sentence. 18 U. S. C. A. 710, Douglas v. King, 110 F. 2d. 911.

When it was determined that prisoner was of unsound mind before expiration of his sentence, his case was taken out of operation of statute providing for deductions from sentence for good conduct and was governed by statute providing for transfer to hospital until restored to sanity, or until maximum sentence is served. 18 U. S. C. A. 710, Douglas v. King, 110 F. 2d. 911.

Where conditions under which prisoner's right to have deductions made from sentence for good conduct might become absolute had not occurred before determination of his mental un-
8 soundness, he was not deprived of any constitutional right by enforcement of statute providing for transfer to hospital until restored to sanity, or until max'mum sentence expires. 18 U. S. C. A. 710, 876, Douglas v. King, 110 F. 2d. 911.

PETITIONER'S CONCLUSIONS

There is consequently no escape from the conclusion that the petitioner was twice put in jeopardy, and if he was not twice in jeopardy for the same offence, the word jeopardy should be stricken from every book and record in the United States.

IDENTITY OF OFFENSES

The act of congress has made the judgments of the supreme court of the district of Columbia conclusive as to the question whether under the circumstances of the case a prisoner has or has not for the same offence been twice put in jeopardy of life or limb. Ex parte Bigelow (1885), 5 Sup. Ct. 542, 113 U. S. 328, 28 L. Ed. 1005.

Whether a conviction or acquittal under one indictment is a bar to a subsequent conviction or sentence under another depends, not or whether defendant has been tried for the same act, but whether he has been put in jeopardy for the identical offence. Ryan v. U. S. (C. C. A. 1914) 216 Fed. 13.

This prohibition is not against being twice punished, but against being twice in jeopardy, and the accused, whether convicted or acquitted, is equally put in jeopardy. Ball vs. U. S. (1896) 16 Sup. Ct. 1192, 1194, 163, U. S. 662, 41 L. Ed. 300; U. S. vs. Gilbert (C. C. 1834) Fed. Cas. No. 15, 204.

The petitioner did not have excess to these good time and jeopardy laws at the time of his trial and he requested his attorney to bring them into the court, and, he would not do so. The petitioner's attorney Mr. Justin Ruark, and the United States Prosecut-
9 ing Attorney, did, conspire, talk, and plan between themselves, to get the petitioner to withdraw his plea of not guilty and enter a guilty plea. They both promised the petitioner if he would enter a guilty plea he would not receive a longer sentence than one year and one day, and, that such sentence would run concurrently with the time he already had, and would not hurt him.

Therefore, the petitioner was deceived and coerced by his attorney and the prosecuting attorney into entering a guilty plea, and, therefore the petitioner was deprived of a constitutional right to assistance of counsel for his defense. U. S. C. A. Cost. Amend. 6—Walker vs. Johnson, 61 S. Ct. 574, reversing 109 F. 2d. 436.

The petitioner has a constitutional right to be present at every stage of his cause (Shields vs. United States, 273 U. S. 583, 46 S. Ct. 478), and the petitioner demands to be taken before the court for a hearing on this motion.

If a federal question is fairly presented by the record and its decision, it is necessary to the determination of the case a judg-

ment which rejects the claim, but avoids all reference to the federal question, is as much against the federal rights as though expressed in terms (Chapman vs. Goodman, 123 U. S. 340, 31 L. Ed. 235) same as above.

No particular form the words is necessary to be used in order that the federal question may said to be involved (Gree Bay, et Canal Co. vs. Pattin paper co., 172 U. S. 58, 43 L. Ed. 364).

The petitioner did not have any legal advise as to how this motion should be drawn up, and the has very little education. Therefore, he is asking the court to over look small mistakes which may be found herein.

10 That he believes his cause of action is meritorious, and that he is entitled to the redress he seeks in said action.

Wherefore, petitioner respectfully prays that the judgment and sentence be vacated and/or set aside as prayed for.

Respectfully submitted.

Jimmie Ira Brown,
JIMMIE IRA BROWN,
Petitioner.

[*Duly sworn to by Jimmie Ira Brown; jurat omitted in printing.*]

11 In the District Court of the United States for the Western District of Missouri, Southwestern Division

[Title omitted.]

Order overruling motion to vacate judgment and sentence

Filed April 19, 1946

Now on this day the separate applications of the above-named defendants to obtain copy of the indictment and commitment filed herein, without paying or securing costs thereof is, by the Court, sustained and the Clerk is ordered to forward to said defendants a copy of said documents.

The Court, having considered the motion of the defendant Jimmie Ira Brown to vacate and set aside the judgment and sentence heretofore entered and imposed herein and being fully advised in the premises thereof, said motion is, by the Court, overruled.

ALBERT A. RIDGE, *Judge.*

Dated at Kansas City, Missouri, this 18th day of April 1946.

12 District Court of the United States, Western District of Missouri, Southwestern Division

[Title omitted.]

Notice of appeal

Filed May 15, 1946

Notice is hereby given, and defendant, Jimmie Ira Brown does hereby take an appeal to the United States Circuit Court of Appeals, in and for the Eighth Circuit, from the orders and judgments of the United States District Court, the Honorable Judge Albert A. Ridge, presiding Justice, in and for the Western District of Missouri, Southwestern Division at Joplin, Missouri, from an order dismissing the motion to vacate and/or set aside judgment and sentence, and supporting brief, and refusal to grant said motion, made and entered against defendant herein on the 18th day of April 1946.

Jimmie Ira Brown,
JIMMIE IRA BROWN,
Appellant, in propria persona.

[*Duly sworn to by Jimmie Ira Brown; jurat omitted in printing.*]

13 District Court of the United States, Western District of Missouri, Southwestern Division

[Title omitted.]

Motion for leave to proceed in forma pauperis on appeal

Filed May 15, 1946

Now comes, Jimmie Ira Brown, the defendant named and respectfully moves this Honorable Court for permission and leave to proceed in forma pauperis in taking of an appeal, and appealing to the United States Circuit Court of Appeals, in and for the Eighth Circuit without payment of costs and fees of court, and without cost of printing the records.

This motion is based upon the affidavit of forma pauperis annexed and made part of this motion.

JIMMIE IRA BROWN, *Appellant.*

[*Duly sworn to by Jimmie Ira Brown; jurat omitted in printing.*]

14 District Court of the United States, Western District of Missouri, Southwestern Division

[Title omitted.]

Affidavit in forma pauperis

Filed May 15, 1946

Jimmie Ira Brown, being duly sworn deposes and says; that he is the petitioner in the above entitled matter. That he desires to appeal from an order dismissing the issuance of a motion to vacate and/or set aside judgment and sentence by the above entitled court to the United States Circuit Court of Appeals, in and for the Eighth Circuit.

That he believes and states: that he has good and meritorious groun's for persecuting said appeal to said appellate court. That affiant has not sufficient money or means sufficient to prosecute said appeal to said Appellate Court. That affiant is a citizen of the United States. That affiant is without sufficient money or means to pay the costs of court and costs of printing records and briefs on appeal, that affiant has no property with which to secure the payment of said costs of appeal. That affiant has no person who is sufficiently interested in his case that will pay the cost for him.

Wherefore, affiant prays that an order be issued by this court, allowing and permitting affiant to take and perfect said appeal and to prosecute the same before said appellate court, without the payment of fees and costs, and to have typewritten the records of appeal and such other documents pertaining thereto.

JIMMIE IRA BROWN, *Petitioner.*

Subscribed and sworn to before me this 3rd day of May, 1946.

[SEAL] EDWARD O. DOUGHTY,
Notary Public.

My Commission Expires May 21, 1949.

Filed in the U. S. District Court on the 15th day of May 1946.

15 District Court of the United States, Western District of Missouri, Southwestern Division

[Title omitted.]

Praceipe for record

May 15, 1946

To the Clerk of the above entitled Court:

It is requested that in the above entitled case, for the taking of an appeal to the United States Circuit Court of Appeals, in and for

the Eighth Circuit, you prepare, and proceed in accordance with the rules promulgated by the United States Supreme Court, the following documents, to wit:

A transcript of the records, in which includes:

a. Motions to vacate and/or set aside judgment and sentence, and supporting brief.

b. Findings of the court. Memorandum.

c. The order of the court denying the motion to vacate and/or set aside judgment and sentence, and supporting brief.

d. Notice of appeal.

e. Order for leave to appeal in forma pauperis.

f. Affidavit in forma pauperis.

g. Assignment of errors.

JIMMIE IRA BROWN,
Appellant—pro-se.

[*Duly sworn to by Jimmie Ira Brown; jurat omitted in printing.*]

16 District Court of the United States, Western District of Missouri, Southwestern Division

[Title omitted.]

Assignment of errors

Filed May 15, 1946

The defendant assigns as errors, the following: The court erred in denying the motion to vacate and/or set aside judgment and sentence and in dismissing the same, for the reason that said motion alleges sufficient facts showing that defendant is illegally confined under a void judgment and sentence.

2. The court erred in denying the motion to vacate and/or set aside judgment and sentence and in dismissing the same, for the reason that the defendant is entitled to his relief sought by said motion.

The court erred in denying the motion to vacate and/or set aside judgment and sentence and in dismissing the same, for the reason that the defendant's fundamental and constitutional rights have been violated.

The court erred in denying the motion to vacate and/or set aside judgment and sentence and in dismissing the same, for the reason that the jurisdiction of a federal court must be certain; it can not be assumed nor presumed.

Respectfully submitted.

JIMMIE IRA BROWN,
Defendant in proper person.

17 In the District Court of the United States for the Western District of Missouri, Southwestern Division

[Title omitted.]

Order denying petition to appeal in forma pauperis

Filed May 15, 1946

On this day there is presented to the Court, the petition of the above-named appellant, praying for an Order of Court permitting him to appeal from a judgment of this court, heretofore entered in forma pauperis.

The Court having read and considered said petition and finding that there are no grounds stated in said petition that would justify an appeal, the Court finds no merit in an appeal from said judgment aforesaid.

It is therefore ordered by the Court that the petition for appeal in forma pauperis, in the above-stated case, be, and the same hereby is, denied.

Dated at Kansas City, Missouri, this the 14th day of May 1946.

ALBERT A. RIDGE, *Judge.*

18 District Court of the United States, Western District of Missouri, Southwestern Division

[Title omitted.]

Exhibit "A"—Motion to correct sentence

To the Honorable ALBERT A. RIDGE, *United States District Judge:*

Comes now, Jimmie Ira Brown, defendant in the above-described and numbered cause, and moves this Honorable Court to vacate the sentence heretofore imposed on criminal case No. 1932, as being erroneous, incorrect, and illegal, the grounds therefore being hereinafter fully set forth.

JURISDICTION

The jurisdiction of this Honorable Court is hereby invoked under authority of the U. S. Circuit Court of Appeals for the Tenth Circuit, in Gilmore vs. U. S., 124 Fed. (2d) 537, and the authority of the Supreme Court of the United States, cited herein, among numerous authorities in point.

STATEMENTS OF FACTS

Defendant has been sentenced as follows:

1. On criminal case No. 840, El Dorado, Arkansas, October 26, 1945, one (1) year from this date on the second count, and for a period of two (2) years on the first count to begin at the expiration of the sentence pronounced on the second count; making a total of three (3) years imprisonment in this case.

2. On criminal case No. 839, El Dorado, Arkansas, October 26, 1945, sentence of two (2) years, to begin at the expiration of the sentence adjudged on this day by the court against said defendant on the first count of criminal case No. 840.

19 3. On criminal case No. 1933, at Joplin, Missouri, January 17, 1946, sentence of five (5) years for an attempted escape, 18 U. S. C. A. Sec. 753h, to begin at the expiration of any sentence he is now serving, or to be served which was imposed prior to this date, without cost.

CONTENTIONS, GROUNDS FOR MOTION

Defendant's contentions are that the five (5) year sentence imposed upon his in criminal case No. 1933 for violating the federal escape act in this court, as referred to above, is illegal and void for the reason that it does not comply with the statutory requirements of the escape act, 18 U. S. C. A. Sec. 753h; i. e. the sentence, in order to conform to the requirements of the act, would begin to run at the expiration of, or legal release from, the sentence defendant was being held under at the time he attempted to escape, that is, the first, or one year sentence imposed in Arkansas. (To make it clear) defendant was being held under the first, or one year sentence imposed in Arkansas when he attempted to escape, and was not being held under the other two sentences imposed in Arkansas when he attempted to escape.

There being distinct or difference in the fact that such sentences were imposed upon him, and that fact that he was not being held under actual and constructive rendition servitude of sentence of the second and third sentences.

The provisions of the statute under which defendant relies reads as follows: 18 U. S. C. A. Sec. 753h, "If such person be under sentence at the time of such offense, the sentence imposed hereunder shall begin upon the expiration of, or legal release from, any sentence under which such person is held at the time of such escape or attempt escape."

ARGUMENT

To support his contentions, defendant submits argument and reasoning of other courts, the escape act itself provides, the sentence

imposed hereunder shall begin upon the expiration of, or legal release from, the sentence being served at the time of the offense. 18 U. S. C. A. Sec. 753h.

20 Now, the fifth Circuit Court of Appeals, and the Tenth Circuit Court of Appeals in re: Rutledge vs. U. S., 146 F. (2d) 199; Thomas vs. Hunter, 153 Fed. (2d) 834; McMahan vs. Hunter, 150 F. (2d) 498, continuing these provisions of the act, declared that it is clear the escape sentence is a separate and independent sentence, and in offense, that it is mandatory that the sentence imposed for an escape or attempted escape shall begin at the expiration of, or legal release from. The sentence being served at the time of such offense.

The defendants first sentence, the one year sentence was imposed for an attempted escape, 18 U. S. C. A. Sec. 753h, and is separate from his other two sentences imposed in Ark., for that reason it would have been impossible for defendant to have been held on, or under the authority of any sentence except the one year sentence he was serving when he attempted to escape. For these reasons, the five (5) year sentence imposed upon defendant in this court for violating the federal escape act, should begin to run at the expiration of, or legal release from, the one year sentence which defendant was serving when he attempted to escape, and not at the expiration of all three sentences imposed in Arkansas.

If Congress had intended to require that the sentence for an escape or attempt escape should run consecutively to all sentence imposed prior to the offense, it would undoub'tly have employed language plainly expressive of that intent; indeed such language was not used in connection with escape attempted after the imposition of several consecutive sentences.

THE FINAL RULE

All authorities support the settled rule that uncertainties must be resolved in favor of the defendant and his personal liberty.

PRAYER

Wherefore, good and sufficient cause having been shown in the foregoing, both in law and in facts, defendant moves this
21 Honorable Court, to set aside its pronounced sentence in criminal case No. 1933, and render and pronounce a new judgment in the said cause, in its proper and legal form.

JIMMIE IRA BROWN, *Movant.*

[*Duly sworn to by Jimmie Ira Brown; jurat omitted in printing.*]

22 District Court of the United States, Western District of Missouri, Southwestern Division

Affidavit in forma pauperis

STATE OF KANSAS,
County of Leavenworth, ss:

Personally appeared before me this date Jimmie Ira Brown, and being first by me duly sworn, upon his oath, deposes and says; that he is a citizen of the United States of America, and the defendant in the motion to correct sentence in criminal case No. 1933, that he verily believes he has a meritorious cause of action, that it is brought in good faith, and that he believes he is entitled to the redress he seeks herein.

But that because of his poverty he is unable to pay the cost of prosecuting the same, or to furnish security in lieu thereof; Section 832, Title 18 U. S. C. A., U. S. Ex rel Extabrook vs. Otis (8th) Circuit Court.

Wherefore defendant respectfully prays that he be by this court permitted to bring and to prosecute this said suit or action as a poor person.

JIMMIE IRA BROWN,
Defendant—Movant Pro-Per.

Subscribed and sworn to before me this 19th day of July 1946.

[SEAL] FRANK A. ROBERTS,
Notary Public.

My commission expires 2/28/48.

23 *Exhibit "A" to motion*

Indictment in two counts: Section 88, T. 18, U. S. C. A., Section 753h, T. 18, U. S. C. A.

UNITED STATES OF AMERICA,
Western District of Arkansas, Texarkana Division, ss:

In the District Court of the United States, in and for the Western District aforesaid, at the May Adjourned Term thereof, A. D. 1945.

The Grand Jurors of the United States, impaneled, sworn, and charged to inquire into offenses committed in the Western District of Arkansas, at the Term aforesaid, on their oath aforesaid, do hereby present and charge, that before the committing of the several offenses in this indictment mentioned, Hulan Cecil Rutledge, who has also been known under aliases C. H. Rutledge, H. J. Rutledge, James Cecil Rutledge, J. B. Adair, Hulan James Cecil Rutledge, James C. Love, "Peewee,"; Jimmie Ira Brown, who has

also been known under aliases Jimmie Brown, James Stroud, and Michael Doil Woolsey, hereinafter in the several counts of this indictment call defendants, then and there well knowing the facts set forth in this indictment, did on or about July 1, 1945, in the El Dorado Division of said District, and within the jurisdiction of said Court, devise a scheme and artifice to effect the escape of the defendants Hulan Cecil Rutledge and Jimmie Ira Brown from the County Jail of Union County, Arkansas, at El Dorado, Arkansas, in said County, said scheme and artifice being in substance and effect as follows, to wit:

That the said defendant Michael Doil Woolsey, being then and there imprisoned in said county jail of Union County,
24 Arkansas, upon his release from said jail would procure and bring to and introduce into said county jail of Union County, Arkansas, hack saw blades to be used by the said defendants Rutledge and Brown in sawing the bars of the cell in said jail wherein the said defendants Rutledge and Brown were imprisoned, whereby said defendants Rutledge and Brown would be enabled to pass through the opening thereby made and so escape from said Union County jail, the said defendant Rutledge being then and there imprisoned and confined therein in the custody of the Attorney General of the United States under and by virtue of a conditional release violator's warrant duly issued by the United States Board of Parole at Washington in the District of Columbia, on or about July 9, 1945, and the said defendant Brown being then and there imprisoned and confined in said jail by virtue of certain process under the laws of the United States by judgment of John G. Ragsdale, as United States Commissioner for the Western District of Arkansas, in the El Dorado Division as aforesaid, whereby the said defendant Brown was bound over to await the action of the Grand Jury of the United States to be next impaneled and convened in said Western District of Arkansas, upon a charge that he, the said Jimmie Ira Brown, had violated Section 408 of Title 18, United States Code Annotated, by transporting in interstate commerce a certain automobile knowing the same to be stolen from the owner thereof, said order committing the said defendant Brown having been made and entered on June 29, 1945.

That the said defendants, and each of them, did unlawfully, knowingly, and feloniously combine, agree, and conspire among themselves and with each other that the said defendant Michael Doil Woolsey would, upon his release from said Union County Jail as aforesaid, procure and bring to said jail and introduce and cause to be introduced therein certain hack saw blades with the
25 intent and purpose of enabling the said defendants Rutledge and Brown to escape from said jail.

That having devised said scheme and conspiracy to procure and effect the escape of the said defendants Rutledge and Brown, the said defendant Michael Doil Woolsey, for the purpose of executing and carrying out the same, did unlawfully, knowingly, and feloniously commit certain overt acts in that the said defendant Michael Doil Woolsey, on or about July 3, 1945, procure certain hack saw blades and bring the same to the County Jail of Union County, Arkansas, at El Dorado, and cause the same to be delivered to the said defendants Rutledge and Brown, and that the said defendants Rutledge and Brown used said hack saw blades in sawing the bars of the cell in said jail in which the said defendant Rutledge and Brown were confined and thereby attempted to escape from said jail, all of which is contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

COUNT TWO

And the Grand Jurors aforesaid, on their oath aforesaid, do further present and charge, that the said Hulan Cecil Rutledge, with aliases, and Jimmie Ira Brown, with aliases, on or about the 3rd day of July 1945, being in the custody of the Sheriff of Union County, State of Arkansas, and confined in said jail as more fully described and set forth in count one of this indictment, all of said count one being fully and completely adopted as part of this count of this indictment the same as if all of the allegations of the said count one were fully copied and set forth herein, did unlawfully and feloniously attempt to escape from such custody and
26 confinement by sawing with hack saw blades and attempting to sever the bars of said jail, with the intent and purpose on the part of said defendants to effect an opening in said bars through which the said defendants might pass and escape from said jail, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

Clinton R. Barry,
CLINTON R. BARRY,
United States Attorney.

No. 840. United States District Court. Western District of Arkansas Texarkana Division. The United States of America vs. Hulan Cecil Rutledge, Jimmie Ira Brown, Michael Doil Woolsey. Indictment. 2 cts. Sec. 88 T. 18 U. S. C. A., Sec. 753h T. 18 U. S. C. A. A true bill. Roy W. Davis, Foreman. Filed Aug. 28, 1945. Truss Russell, Clerk, by S. A. Phillips, Deputy Clerk.

745463—47——3

27 District Court of the United States, Western District of Arkansas, Eldorado Division

No. 840

UNITED STATES

v.

JIMMIE IRA BROWN

Criminal in Two Counts for Violation of U. S. C., Title 18, Secs. 88 and 753h

On this 26th day of October 1945, came the United States Attorney and the defendant, Jimmie Ira Brown, appearing in proper person, and by S. E. Gilliam, his attorney, and,

The defendant having been convicted on his plea of guilty of the offense charged in the indictment in the above-entitled cause, to wit: Count 1: Conspiring with Hulan Cecil Rutledge and Michael Doil Woolsey, on or about July 1, 1945, to effect the escape of Hulen Cecil Rutledge and of himself from Union County Jail, at El Dorado, Arkansas, wherein they were incarcerated; Count 2: On or about July 3, 1945, unlawfully attempt to escape from said jail by sawing with hack saw blades and attempting to sever the bars of said jail; and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against , and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of one (1) year from this date on the second count of the indictment in this cause, and for the period of two (2) years on the first count of the indictment, to begin at the expiration of the sentence of imprisonment herein adjudged on the second count; making a total of three years imprisonment on the indictment in this case.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

(Signed) JNO. E. MILLER,
United States District Judge.

28 District Court of the United States, Western District of Arkansas, Eldorado Division

Criminal Case No. 840

UNITED STATES

vs.

JIMMIE IRA BROWN (ET AL.)

Docket Entries pertaining to defendant Brown

8-28-45—Indictment returned by Grand Jury in Texarkana Division, ordered docketed in El Dorado Div'n for prosecution.

8-28-45—Ordered that Capias issue upon application of U. S. Atty.

10-15-45—Defendants Brown and Rutledge request assignment of counsel. S. E. Gilliam appointed atty. for Brown.

10-15-45—Defts. Brown and Rutledge waive arraignment and plead not guilty to each of the 2 counts, and are remanded to jail.

10-15-45—Trial of case for all defts. set for Oct. 22, 1945.

10-15-45—Prec. for Subp. filed.

10-15-45—Subp. for writs on behalf of U. S. retnb. 10-22-45 issued, with one copy and mailed to Marshal at Jackson, Miss.

10-15-45—Subpoena for witnesses on behalf of U. S. returnable 10-22-45, issued with 4 copies and mailed to Marshall at Jackson, Miss.

10-15-45—Praecipe for subpoena filed.

10-15-45—3 subpoenas for U. S. witnesses returnable 10-22-45 issued with 4 copies and delivered to marshal.

10-19-45—Prec. for subpoenas for witnesses on behalf of defendant James Ira Brown, filed by S. E. Gilliam, his attorney.

10-19-45—Subpoena for witnesses on behalf of deft. James Ira Brown returnable 10-22-45 issued with copy and delivered to marshal.

10-19-45—Subpoena for witnesses on behalf of James Ira Brown returnable 10-22-45 issued with copy and mailed to marshal at Jackson, Miss.

10-19-45—Subpoena for witnesses on behalf of deft. James Ira Brown returnable 10-22-45 issued with copy and mailed to marshal at Shreveport, La.

10–19–45—Subpoena for witnesses on behalf of deft. Ira Brown returnable 10–22–45 issued with copy and mailed to marshal at Dallas, Texas.

10–22–45—Defendant Brown in person and by counsel withdraws plea of not guilty and enter plea of guilty to both counts.

10–22–45—Deft. Rutledge in person and by counsel withdraws plea of not guilty and enters plea of guilty to both counts.

10–22–45—Court accepts above pleas of guilty after advising defts. of possible maximum penalty upon conviction and after defendants repeated their respective plea of guilty.

10–22–45—Defendants remanded to jail to await sentence.

10–24–45—1 plaintiff's witness subpoena returned as executed, filed.

10–26–45—Judgment—Defendant Brown: ct. 2—Custody of Attorney General for one year from this date for imprisonment. Ct. 1—Custody of Attorney General for imprisonment for 2 years, to begin at the expiration of sentence adjudged on 2d count. Judgment and commitment filed. 2 certified copies of Judgment and commitment delivered to marshal.

11– 1–45—To filing 2 defendants witness subpoenas returned unexecuted.

11– 7–45—Mittimus as to defendant Jimmie Ira Brown returned as executed, filed.

11–30–45—Reporter's transcript of proceedings with original stenographic notes attached, filed together with proceedings and notes in criminal cases Nos. 834 and 839.

1–30–46—Application of deft. Brown to obtain court records without paying costs or securing costs thereof to wit: Certified copy of indictment, Judgment, and commitment, and docket entry, filed.

1–30–46—Order directing defendant Brown be furnished with certified copies of indictment, Judgment, and Commitment, and docket entries. Order filed.

29 UNITED STATES OF AMERICA,
Western District of Arkansas, ss:

I, Truss Russell, Clerk of the United States District Court in and for the Western District of Arkansas, do hereby certify that the annexed and foregoing is a true and full copy of the original indictment filed August 28, 1945, in Criminal case No. 840, United States of America vs. Hulan Cecil Rutledge, Jimmie Ira Brown, and Michael Doil Woolsey, and Judgment and Commitment, en-

tered October 26, 1945, as to defendant Brown, and docket entries pertaining to defendant Brown, in said Criminal Case No. 840, as they appear on file and as of record in *Eldorado* Division of said district.

In testimony whereof, I have hereunto subscribed by name and affixed the seal of the aforesaid Court at Fort Smith, Arkansas, this 5th day of February A. D. 1946.

[SEAL] TRUSS RUSSELL,
Clerk.
By E. A. Riddle,
E. A. RIDDLE,
Deputy Clerk.

30 *Exhibit "B" to motion*

UNITED STATES OF AMERICA,
Western District of Arkansas, Texarkana Division, ss:

In the District Court of the United States, in and for the Western District aforesaid, at the May Adjourned Term thereof, A. D. 1945.

The Grand Jurors of the United States, impaneled, sworn, and charged as the Term aforesaid, of the Court aforesaid, on their oath present, that Jimmie Ira Brown and Hulan Cecil Rutledge on or about the 17th day of June, in the year of our Lord nineteen hundred & forty-five, in the Eldorado Division of said District and within the jurisdiction of said Court, did unlawfully, knowingly, wilfully, and feloniously transport in interstate commerce from the City of Vicksburg, in the State of Mississippi, to the Town of Bearden, in the State of Arkansas, a certain motor vehicle, to wit, one 1937 Ford Coach automobile, motor number 18-37001537, the personal property of Henry P. Williams, which had theretofore been stolen, taken, and driven away without the consent of the owner and with intent to deprive the said owner thereof, said defendants at the time of so transporting said motor vehicle in interstate commerce as aforesaid, well knowing that the same had been stolen, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

CLINTON R. BARRY,
United States Attorney.
[S] Thomas C. Pitts,
By THOMAS C. PITTS,
Assistant United States Attorney.

No. 839. District Court of the United States, Western District of Arkansas. The United States vs. Jimmie Ira Brown, Hulan Cecil Ruthledge. Indictment. 1 ct. Sec. 408, T. 18, U. S. C. A. A true bill, Roy W. Davis, Foreman. Filed Aug. 28, 1945. Truss Russell, Clerk. By S. A. Phillips, Deputy Clerk.

31 District Court of the United States, Western District of Arkansas, El Dorado Division

No. 839

Criminal in One Count for Violation of U. S. C., Title 18, Secs. 408

UNITED STATES

v.

JIMMIE IRA BROWN

On this 26th day of October 1945, came the United States Attorney, and the defendant Jimmie Ira Brown appearing in proper person, and by S. E. Gilliam, his attorney, and,

The defendant having been convicted on his plea of guilty of the offense charged in the indictment in the above-entitled cause, to wit: Transporting in interstate commerce, or or about June 17, 1945, and from Vicksburg, in the State of Mississippi, to Bearden, in the State of Arkansas, one 1937 Ford Coach automobile, motor No. 18-3700153, the personal property of Henry P. Williams, knowing at the time of such transportation that said automobile had been theretofore stolen, and the defendant having been now asked whether he has anything to say why judgment should not be pronounced against him, and no sufficient cause to the contrary being shown or appearing to the Court, it is by the Court

Ordered and adjudged that the defendant, having been found guilty of said offenses, is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for the period of two (2) years, to begin at the expiration of the sentence of imprisonment adjudged on this day by the court against said defendant on the first count of the indictment in Case No. 840.

It is further ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other

qualified officer and that the same shall serve as the commitment herein.

(Signed) JNO. E. MILLER,
United States District Judge.

A true copy filed this 26th day of October 1945.

(Signed) TRUSS RUSSELL,
Clerk.

(By) (S) S. A. Phillips,
S. A. PHILLIPS,
Deputy Clerk.

32 District Court of the United States, Western District of Arkansas, El Dorado Division

No. 839 Crim. Indictment in On Count for Violation of U. S. C. Title 18, Sec. 408

UNITED STATES

vs.

JIMMIE IRA BROWN, ET AL.

DOCKET ENTRIES

Aug. 28, 1945—Indictment returned.

Oct. 15, 1945—Defendant Jimmie Ira Brown waived counsel in this case (after requesting and having been granted counsel in cases 834 and 840) and was arraigned and plead guilty. Defendant Brown is remanded to jail to await sentence.

Oct. 15, 1945—Walter L. Brown appointed attorney for defendant Hulan C. Ruthledge.

Oct. 15, 1945—Defendant Hulan C. Ruthledge waived arraignment and plead not guilty and is remanded to jail to await trial on October 22, 1945.

Oct. 22, 1945—Nolle prosequi as to defendant Hulan C. Ruthledge.

Oct. 26, 1945—Judgment: Defendant Jimmie Ira Brown: Custody of the Attorney General for imprisonment for 2 years, to begin at the expiration of sentence adjudged on count 1 of the indictment in case 840 Crim. Judgment and commitment filed. 2 certified copies of Judgment and commitment delivered to U. S. Marshal.

Nov. 7, 1945—To fil mittimus returned as executed.

Nov. 30, 1945—Court Reporter's original notes and transcript of proceedings as to both defendants filed and lodged in Case No. 840.

33 UNITED STATES OF AMERICA,
Western District of Arkansas, ss:

I, Truss Russell, Clerk of the United States District Court in and for the Western District of Arkansas, do hereby certify that the annexed and foregoing is a true and full copy of the original Indictment, Judgment, and Commitment and Docket Entries in Criminal Case No. 839—United States vs. Jimmie Ira Brown, and now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at El Dorado, Arkansas this 21st day of February A. D. 1946.

[SEAL]

TRUSS RUSSELL,
Clerk.
By OLIVE W. SOUTHWARD,
Deputy Clerk.

34 In the District Court of the United States for the Western District of Missouri, Southwestern Division

No. 1933

UNITED STATES OF AMERICA, PLAINTIFF

v.

JIMMIE IRA BROWN, DEFENDANT

Memorandum opinion

Filed Aug. 23, 1946

The *Federal Escape Act, 18 U. S. C. A., Sec. 753h*, provides that any person committed to the custody of the Attorney General, or his authorized representative who, after "conviction for any offense whatsoever" escapes, or attempts to escape, from such custody shall be guilty of an offense, and that "if such person be under sentence at the time of such offense, the sentence imposed" for the escape "shall begin upon the expiration of, or upon legal release from, *any* sentence under which such person is held at the time of such escape or attempt to escape." [Italics supplied.]

On October 26, 1945, defendant Jimmie Ira Brown, on his plea of guilty to three separate charges, contained in two indictments, was sentenced by the United States District Court, Western District of Arkansas, El Dorado Division, for a total of five years' imprisonment. The sentences imposed under the indictment containing two such charges, reads as follows:

"One year from this date on the Second Count and for a period of two years on the First Count to begin at the expiration of the

sentence pronounced on the Second Count, making a total of three years' imprisonment in this case."

35 For the offense charged in the second indictment, the sentence pronounced by the Court was as follows:

"* * * two years to begin at the expiration of the sentence adjudged on this day by the Court against said defendant on the First Count of Criminal Case No. 840."

On November 2, 1945, while defendant was in the custody of two United States Marshals, being conducted through the State of Missouri to Leavenworth Penitentiary, and while within the jurisdiction of this Court, the defendant and another prisoner attempted to escape from such custody, by force and putting the lives of said Marshals in imminent peril. On his plea of guilty to an indictment returned against defendant charging a violation of Sec. 753h, he was sentenced to five years in the custody of the Attorney General of the United States. The judgment imposing said sentence, reads in part as follows:

"Five years to begin at the expiration of any sentence he is now serving, or to be served which was imposed prior to this date, without costs."

Defendant has filed motion to correct the last-referred to sentence, contending the same to be erroneous, incorrect, and illegal. As grounds for said motion defendant alleges that the five-year sentence imposed upon him, for violating the Federal Escape Act, does not comply with the statutory requirements of said Act in that said sentence should have been made to commence at the termination of the one-year sentence first imposed upon defendant by the United States District Court in Arkansas, and not at the termination of the accumulative sentences imposed upon him by said Court prior to his attempted escape. In support of such

36 contention defendant submits the following argument: The first sentence imposed upon him was a one-year sentence and at the time he attempted to escape he was in the custody of the officers transporting him to Leavenworth Penitentiary under said sentence; that said sentence had begun to run (under T. 18, U. S. C. A., Sec. 709a) while he was in jail awaiting transportation to the Penitentiary. Under such circumstance defendant asserts "it would have been impossible for defendant to have been" in custody "under the authority of any sentence except the one-year sentence he was serving when he attempted to escape." So reasoning, defendant says that the five-year sentence, imposed upon him by this Court for violation of the Federal Escape Act, "should begin to run at the expiration of, or legal release from, the one-year sentence which defendant was serving when he attempted to

escape and not at the expiration of all three sentences imposed in Arkansas."

In support of such contention defendant relies upon the cases of Rutledge v. U. S., 146 F. (2d) 199; Thomas v. Hunter, 153 F. (2d) 834; McMahan v. Hunter, 150 F. (2d) 498 and Gilmore v. U. S., 124 F. (2d) 537. The authorities so cited by defendant do not substantiate the contention here made. In the Rutledge case, supra, defendant was convicted of an attempted escape from official custody before imposition of any sentence against him. The ruling of the Rutledge case is that, under such circumstances the Court may assess a sentence under Sec. 753h, supra, and order it to run concurrently with another sentence. In Thomas
37 v. Hunter, supra, while petitioner was on parole from a previous conviction he was arrested and charged, in an indictment, with violation of the Dyer Act, 18 U. S. C. A., Sec. 408. While in the custody of the Marshal he attempted, on two occasions, to escape. He was indicted in separate indictments for each of these attempted escapes. He pleaded guilty to the charge under the Dyer Act and was tried and found guilty by a jury in each of the attempted escape cases. He was sentenced to serve a term of four years on the Dyer Act violation and to an additional sentence of five years each on the two escape charges. The sentences were made to run consecutively, for a total term of fourteen years. Petitioner, in Thomas v. Hunter, supra, contended that the sentences imposed upon him for the two attempted escapes should have been made to commence to run at the termination of the sentence for the offense which he had committed prior to the commission of the Dyer Act offense, and for which, at the time of his arrest, he was out on parole. The Court there held that the sentences imposed on petitioner for the attempted escapes could be made to begin to run from the completion of the sentence for the crime committed by petitioner while on parole. The Court there said:

"Where one is confined and actually serving a prior sentence when he escapes from custody, then the sentence for such escape must be fixed with relation to the expiration date of the prior sentence or with reference to the date on which one is thereafter legally released from confinement thereunder."

The effect of the holding in the Thomas case, supra, is contrary to the contention here made by the defendant. In Mc-
38 Mahan v. Hunter, supra, defendant was held under a three-year sentence imposed for violation of the Dyer Act and brought habeas corpus proceedings, attacking two separate sentences of two years each, imposed for violations under the Federal Escape Act. The sentences imposed for violation of the Federal

Escape Act were, by their express terms, made to run consecutively after the sentence imposed for violation of the Dyer Act. The total term of such sentences was seven years' imprisonment. The Court, in the McMahan case, did not pass upon the legality of the sentences imposed under the Federal Escape Act but denied the writ there sought because petitioner established, by his petition, that he was legally confined under the three-year sentence imposed for violation of the Dyer Act, the Court holding that under such circumstances petitioner could not, in that action, contest the validity of the sentences imposed under the Federal Escape Act. In Eyler v. Aderhold, 73 F. (2d) 372, petitioner, while under a sentence of two years and six months, escaped from the Federal Prison Farm at Camp Lee, Virginia. For such escape he was sentenced to one year and one day under the Federal Escape Act. The judgment recited that the sentence imposed be in addition to any sentence then being served and imposed against the petitioner therein in another jurisdiction. After serving his two-year and six-month sentence he sought release, by habeas corpus, claiming that the sentence under the Federal Escape Act should have been made to run concurrently with the sentence previously imposed upon him, the defendant basing such contention on Sec. 709a, 18 U. S. C. A. The Court
denied the contention there made by petitioner and held
39 that to give effect to petitioner's contention would be to hold that Congress had repealed Sec. 753a, 18 U. S. C. A., insofar as said last-named section provides that a sentence thereunder shall begin to run after the expiration of the sentence being served when the escape occurred.

Research has failed to disclose a case in which the identical question here presented has been decided. However, in Thomas v. Hunter, supra, the Court, considering the last sentence of Sec. 753h, supra, in connection with Sec. 709a of T. 18, U. S. C. A., and in the light of the contention made by petitioner in that case, said:

"The words of the statute are:

"'The sentence imposed hereunder shall begin on expiration of, *or upon legal release* from, any sentence *under which such person is held at the time of such escape* * * *.' If petitioner's construction of the statutory proviso were correct, then the phrases 'or upon legal release' and 'under which such person is held at the time of such escape' would be meaningless and would be more surplusage."

In the case at Bar defendant was in the custody of the United States Marshals from whom he attempted to escape while said Marshals were in possession of process (three judgments and commitments) calling for defendant's confinement in the custody of

the Attorney General of the United States for a total of five years. Defendant had begun service of said sentences while in jail at El Dorado, Arkansas, awaiting transportation to the place at which his sentence was to be served. Under the sentences then imposed against defendant he could not have been legally released
40 from such confinement until October 25, 1950, unless his sentence was reduced in accordance with the provisions of T. 18, U. S. C. A, Sec. 710. The last-referred-to section allows deductions for good conduct from sentences of persons convicted of offenses against the laws of the United States, and sets forth the manner in which such good conduct deductions should be computed. The last sentence of said Sec. 710, supra, provides:

"When a prisoner has two or more sentences, the aggregate of his several sentences shall be the basis upon which his deduction shall be estimated."

Although each sentence imposed on the defendant by the United States District Court for Arkansas was a separate and distinct entity, yet, with the good time allowance granted to defendant, as a matter of grace by Sec. 710, supra, he could not have been "legally released" from the aggregate amount of such sentences until he had "served such number of days, with good behavior, as, when added to the deductions allowed at the rate of eight days for each month, shall equal the total of the combined sentences assessed against him." Ebeling v. Biddle, 291 F. 567. The mandate of Sec. 753h, supra, is that the sentence to be imposed upon an escapee, or one who attempts to escape, who is under sentence at the time of escape, or attempted escape, shall not begin to run until the expiration of any previous sentence "or upon legal release from *any* sentence under which such person is held." [Italics supplied.] The word "any" according to Webster's New International Dictionary means: "One indifferently out of a number; one, no matter
41 what one."

Defendant, being held under three separate sentences at the time of his attempted escape and not entitled to his legal release therefrom until he had served the term of such sentences according to law, the Court could, under the Federal Escape Act, provide that the sentence imposed thereunder legally begin to run after the service of any one of such sentences, or the combined term of all such sentences. To hold otherwise would be to make meaningless the phrase "or upon legal release from any sentence under which such person is held." To sustain the contention here made by defendant would produce the absurd result of permitting a person, having accumulative sentences, to avoid the penalty provided for a violation of the Federal Escape Act, if such person escaped during the term of the first or an intermediate sentence.

Congress did not intend, by the enactment of the Federal Escape Act, to produce any such result. Defendant's motion, to correct the sentence and judgment heretofore entered herein on the 17th day of January 1946, is, by the Court, overruled.

(S) ALBERT A. RIDGE, *Judge.*

Dated at Kansas City, Missouri, this 22nd day of August 1946.
Filed in the U. S. District Court on the 23rd day of Aug. 1946.

42 In the District Court of the United States for the Western District of Missouri, Southwestern Division

No. 1933

UNITED STATES OF AMERICA, PLAINTIFF

v.

JIMMY IRA BROWN, DEFENDANT

Order overruling motion for correction of sentence

Aug. 22, 1946

Now on this day defendant's motion for correction of sentence is, by the Court, overruled.

(S) ALBERT A. RIDGE, *Judge.*

Dated at Kansas City, Missouri, this 22nd day of August 1946.
Filed in the U. S. District Court on the 23rd day of August 1946.

43 In the District Court of the United States for the Western District of Missouri, Southwestern Division

[Title omitted.]

Notice of appeal

Filed Sept. 2, 1946

Name and address of Appellant—Jimmie Ira Brown, Leavenworth, Kansas.

Name and address of Appellant's attorney—Justin Ruark, Neosho, Missouri, at the time of arraignment, plea, and judgment; none on this appeal.

Offense—Attempt to escape from a United States Marshal while being transported from Eldorado, Arkansas, to the United States Penitentiary at Leavenworth, Kansas.

Judgment—January 17, 1946. Custody of Attorney General for a period of five (5) years to begin at expiration of any sentence is now being served or which is to be served and which was imposed prior to the date of the sentence herein.

I am now confined in the United States Penitentiary at Leavenworth, Kansas.

I, Jimmie Ira Brown, hereby appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the Order entered August 23, 1946, denying my Motion to correct the Sentence and Judgment herein.

Dated September 2, 1946.

JIMMIE IRA BROWN,
By H. C. SPAULDING,
Deputy Clerk, U. S. Dist. Court.

(This Notice of Appeals prepared by the Clerk of the above Court at the request of defendant as provided by Rule 37 of the Rules of Criminal Procedure.)

Received copy of the above-entitled Notice of Appeal on this 2nd day of September 1946.

Sam M. Wear,
SAM M. WEAR,
United States Attorney.
By ———,
Assistant U. S. Attorney.

Filed in the U. S. District Court on September 2, 1946.

44 In the District Court of the United States for the Western District of Missouri, Southwestern Division

[Title omitted.]

Order granting leave to proceed in forma pauperis

Sept. 2, 1946

Upon application of the defendant, it is ordered that he be granted leave to appeal to the United States Circuit Court of Appeals for the Eighth Circuit from the order entered herein on August 23, 1946, denying his Motion to correct the judgment and sentence, and it is

Further ordered that he be permitted to prosecute his appeal in forma pauperis.

Dated this 2nd day of September 1946.

ALBERT A. RIDGE, *District Judge.*

Filed in the U. S. District Court on the 2nd day of September 1946.

45 In United States District Court

Request for Appeal and Transcript

From Jimmie Ira Brown, Leavenworth, Kansas, Sept. 11, 1946,
Post Office Bldg., Kansas City, Missouri.
To Mr. A. L. Arnold, Clerk.

Special purpose. Sept. 14, 1946. Censored 1.

DEAR SIR: In reply to your letter of Sept. 7th, 1946, in which you state that you do not have the authority to comply with Rule 37 of the New Rules of the Supreme Court in Criminal Cases. I wish to call your attention to the Fact that we have no more Roy Bean Courts, and; We have Rules handed down by the United States Supreme Court and we, you, and I are agoing to abide by them.

For your information I have filed No Petition to Appeal in Forma Pauperis from the "Memorandum Opinion" which was heard and overruled August 22, 1946. And in Case you are interested in Rule 37 of the Supreme Court, it provides as follows: "When a Court after trial imposes sentence upon a defendant not represented by Counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant."

It is for the second time hereby requested by the defendant in Criminal Case No. 1933 that you the Clerk of the District Court of the United States for the Western District of Missouri, prepare and file forthwith a notice of appeal from the Districts Court's "Memorandum Opinion" in case No. 1933 Criminal, dated at Kansas City, Missouri, August 22, 1946. It is also hereby requested that you file this as a petition to obtain the following Court records without paying or securing Coust thereof, under the terms of Section 832, title 28 United States Code.

1. Notice of Appeal.
2. Copy of the Memorandum Opinion dated Aug. 22, 1946, in Criminal case No. 1933.
3. Copys of the Arkansas Court records, termed as Exhibit A and B.
4. Affidavit in forma pauperis.
5. Copys of Motion to correct sentence in Case No. 1933 Criminal.
6. Certified Copy of transcript.

All the above entitled records are hereby requested to be
46 sent to the Eighth Circuit Court of Appeals, in St. Louis, Missouri.

PRAYER

Wherefore, good and sufficient Cause having been shown in law and in facts, defendant moves this Honorable Court to grant the

above-entitled request, and Comply with Rule 37 of the Supreme Court in Criminal Cases.

Respectfully Submitted,

JIMMIE IRA BROWN,
Petitioner.

Reg. No. 62288.

47 [Clerk's certificate to foregoing transcript omitted in printing.]

48 United States Circuit Court of Appeals, Eighth Circuit

No. 13445

JIMMIE IRA BROWN, APPELLANT

vs.

UNITED STATES OF AMERICA

Appearances

The Clerk will enter my appearance as Counsel for the Appellant.

ELMO B. HUNTER.

Filed in U. S. Circuit Court of Appeals, Jan. 10, 1947.

Appearance of Mr. Sam M. Wear, as Counsel for Appellee.

The Clerk will enter my appearance as Counsel for the Appellee.

SAM M. WEAR.

Filed in U. S. Circuit Court of Appeals, Oct. 11, 1946.

49 In United States Circuit Court of Appeals

Order of January 7, 1947, appointing counsel to represent appellant and continuing cause to March Term, 1947

Upon examination this day of the brief of appellant there comes to the attention of the Court for the first time the motion attached thereto for appointment of counsel. After consideration of said motion it is Ordered by the Court that Mr. Elmo B. Hunter, of Kansas City, Missouri, be, and he is hereby, appointed as counsel for appellant in this Court to represent said appellant on his appeal and to prepare and file such additional or supplemental brief, if any, as to him may seem advisable. Such additional or supplemental brief, if any, may be in typewritten form, and five clear

legible copies should be filed and a copy served on counsel for appellee on or before February 10, 1947.

To enable counsel to prepare this cause for presentation, it is by the Court hereby continued to the March Term, 1947, of this Court at Kansas City, Missouri.

JANUARY 7, 1947.

50 In United States Circuit Court of Appeals

Order of submission

March 3, 1947.

This cause having been called for hearing in its regular order and counsel not appearing for either party to make oral argument, the same is thereupon taken by the Court as submitted on the transcript of the record from said District Court and the briefs filed herein.

51 United States Circuit Court of Appeals, Eighth Circuit

No. 13445

JIMMIE IRA BROWN, APPELLANT

vs.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the District Court of the United States for the Western District of Missouri

Opinion

April 4, 1947

Mr. Elmo B. Hunter on brief for Appellant.

Mr. Sam M. Wear, United States Attorney, and Mr. Earl A. Grimes, Assistant United States Attorney, on brief for Appellee.

Before GARDNER, THOMAS, and RIDDICK, Circuit Judges.

GARDNER, Circuit Judge, delivered the opinion of the Court.

This is an appeal from an order denying appellant's motion to vacate or correct a sentence entered against him on his plea of guilty to a charge of violating the Federal Escape Act (18 U. S. C. A. Sec. 753h).

52 At the time of the entry of the challenged sentence three sentences had already been imposed against appellant by the United States District Court for the Western District of Arkansas. These sentences were all entered on October 26, 1945, the first being for a term of one year, the second for a term of two years and the third for a term of two years, the sentences to run consecutively. Following the imposition of these sentences appellant was confined to the Federal prison at Leavenworth, Kansas. On November 8, 1945, while appellant was being transported to the Federal prison at Leavenworth, Kansas, for confinement, he attempted to escape from the custody of the United States Marshal and his deputy. This attempt to escape was committed in the State of Missouri and an indictment was duly returned against him charging a violation of Section 753h, Title 18 U. S. C. A. On a plea of guilty to the charge he was sentenced to the custody of the Attorney General of the United States for confinement for a period of five years, the term of the sentence "to begin at the expiration of any sentence he is now serving or to be served which was imposed prior to this date * * *."

On his motion to vacate or amend this sentence appellant contended and renews the contention here that the sentence imposed on him by the United States District Court for the Western District of Missouri should have been made to commence at the termination of the one year sentence, that being the first in order of time of the three consecutive sentences imposed upon him by the United States District Court for the Western District of Arkansas. The first sentence by its terms provided that it should be for a term of "one year *from this date.*" [Italics supplied.] Section 709a, Title 18 U. S. C. A., provides, among other things, that,

"The sentence of imprisonment of any person convicted of
53 a crime in a court of the United States shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of said sentence: Provided, That if any such person shall be committed to a jail or other place of detention to await transportation to the place at which his sentence is to be served, the sentence of such person shall commence to run from the date on which he is received at such jail or other place of detention. No sentence shall prescribe any other method of computing the term."

As has been noted, appellant was, immediately following the imposition of his sentence, committed to the jail at El Dorado, Arkansas, to await transportation to the Federal prison at Leavenworth, Kansas, so that it conclusively appears that from the date of the imposition of the first sentence he was serving that sentence, and hence, he was serving that sentence at the time he attempted to

escape on November 8, 1945. Galatas v. United States, 8 Cir., 80 F. 2d 15. The trial court expressed the view that,

"Defendant being held under three separate sentences at the time of his attempted escape and not entitled to his legal release therefrom until he had served the term of such sentences according to law, the Court could, under the Federal Escape Act, provide that the sentence imposed thereunder legally begin to run after the service of any one of such sentences, or the combined term of all such sentences." U. S. v. Brown, 67 F. Supp. 116.

The sentence as actually imposed was to begin after the service of the combined term of all three prior sentences. The Federal Escape Act (18 U. S. C. A. Sec. 753h) provides that the sentence imposed upon one guilty of an offense thereunder "shall be in addition to and independent of any sentence imposed in the case in connection with which such person is held in custody at the time of such escape or attempt to escape." It further provides that,

"If such person be under sentence at the time of such of-
51 fense, the sentence imposed hereunder shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape."

In the final analysis it would seem that the question determinative of the issue involved is whether at the time appellant attempted to escape he was, as the trial court said, "being held under three sentences." Manifestly, if he were so held then the court was warranted in imposing a sentence "to begin at the expiration of any sentence he is now serving *or to be served*, which was imposed prior to this date." [Italics supplied.] By the specific mandate of his first sentence it was to begin on the date it was imposed. He was at once committed to a jail to await transportation to the place at which his sentence was to be served so that there can be no doubt that he at once began actually serving the first sentence imposed upon him. He could not have been serving nor was he being held under the other sentences because neither of them was to begin until a later date and they constituted no warrant for holding appellant. Each sentence was a separate one and they can not be so commingled as to be converted into one continuous sentence.

The Federal Escape Act provides one rule where a person escapes from legal custody before conviction and another where a person is serving a sentence at the time of attempting to escape. In the former case the sentence may be concurrent with any sentence imposed for any other crime but in the latter case the sentence must be consecutive to the sentence which he is serving and in addition thereto. Rutledge v. United States, 5 Cir., 146 F. 2d 199. Under

the literal words of the statute the sentence provided as punishment for one who is serving a sentence must begin at the expiration of or release from "any sentence under which such person is held at the time of such escape or attempt to escape." The statute
55 is a penal one and should be strictly construed in favor of the accused. Rutledge v. United States, supra; Viereck v. United States, 318 U. S. 236. In the last cited case Chief Justice Stone, speaking for the Supreme Court, said:

"We cannot read that phrase as though it had been written 'while an agent' or 'who is an agent.' The unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction so as to punish one not otherwise within its reach, however deserving of punishment his conduct may seem."

It can not, we think, be said that appellant was being held upon sentences which by their very terms were not to begin until some time in the future. On the other hand, he was being held under a sentence to expire one year from the date of its entry.

Both parties cite and rely somewhat upon the case of Thomas v. Hunter, 10 Cir., 153 F. 2d 834. The facts in that case were that while the accused was out on parole he was indicted and pleaded guilty to a violation of the Dyer Act and was sentenced to four years imprisonment. Thereafter he attempted to escape and on trial was found guilty on two counts and was sentenced to five years imprisonment on each of the two charges, the sentences to run consecutively as was also the sentence under the Dyer Act, making a total of fourteen years imprisonment. The term of sentence for violation of the Federal Escape Act was to begin at the expiration of the sentence imposed under the Dyer Act. It seems that at the time he violated the Dyer Act he was out on parole from a sentence previously imposed and he contended that the sentences under the Federal Escape Act were void because they were not made to begin at the expiration of the term previously entered and from which he was out on parole.

The court held that Thomas was not being held under the
56 sentence from which he was out on parole at the time he violated the Federal Escape Act. It seems clear, however, that if he had been held under a sentence at the time of his attempted escape, under the court's reasoning the sentence should have commenced at the expiration of such prior sentence. In the course of the opinion it is said:

"Petitioner not having been under the original sentence at the time he broke jail, it follows that when the court passed the sentences for the jail break, the provision of the statute which he seeks to invoke did not apply to him.

"Furthermore, we think the proviso upon which petitioner relies means that where one is confined and actually serving a prior sentence when he escapes from custody, then the sentence for such escape must be fixed with relation to the expiration date of the prior sentence or with reference to the date on which one is thereafter legally released from confinement thereunder."

We are of the view that in the instant case appellant was actually serving a prior sentence when he attempted to escape and hence, under the reasoning of the Thomas case, "the sentence for such escape must be fixed with relation to the expiration date of the prior sentence." It is to be observed that in the Thomas case the court held that the provision of the Federal Escape Act here invoked does not apply unless at the time the person attempts to escape he is actually being held in custody under sentence. In the Thomas case the accused was out on parole at the time he attempted to escape and even though the sentence which had been imposed on him had not been completed and his parole might have been revoked so that at some future date he might have to complete serving that sentence, yet the court held that the sentence under the Escape Act was not to be imposed with relation to the prior sentence under which the accused was not in fact being held at the time of his attempted escape. So in the instant case
57 it can not be said that the appellant was being held on the sentences that had been imposed but which would not become effective until a future date. We can not amend the Federal Escape Act, however desirable that may be, so as to read, "The sentence imposed hereunder shall begin upon the expiration of the aggregate of all sentences previously imposed against defendant." The statute seems to be unambiguous so as to express the intention of Congress, and it is noted that in the Federal statute governing good conduct commutations, Congress used the words "aggregate of his several sentences," and the absence of such words from the Escape Act would seem to be significant. It is argued that the words providing that the sentence imposed for escape "shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape," should be construed to include any and all sentences which have been imposed. Under the authorities it is clear that the mere fact that a sentence has been imposed does not necessarily mean that the person is held under such sentence. It may, as in the instant case, by its terms be postponed to commence at a future date. The words "any sentence," as they appear in this statute, are clearly restricted by the words immediately following: "under which such person is held." It is, of course, entirely possible that one might be held under two sentences at the same time if they are imposed to run

concurrently. One of these imposed sentences might be a one year sentence and the other a two year sentence. In such event the sentence under the Escape Act might be fixed to begin at the expiration of either of these sentences being at the time concurrently served.

Being of the view that appellant at the time of his attempted escape was being held under only one sentence, the sentence
58 to be imposed must begin at the expiration of the sentence so being served. The order appealed from is therefore reversed and the cause remanded to the trial court with directions to correct the sentence imposed for violation of the Federal Escape Act so that it shall begin upon the expiration of or upon legal release from the sentence under which appellant was serving at the time of his attempted escape, to wit: the one year sentence imposed by the United States District Court for the Western District of Arkansas.

59 United States Circuit Court of Appeals, Eighth Circuit

JIMMIE IRA BROWN, APPELLANT

vs.

UNITED STATES OF AMERICA

Judgment

April 4, 1947

Appeal from the District Court of the United States for the Western District of Missouri

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Missouri, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court appealed from in this cause be, and the same is hereby, reversed without costs to either party in this Court.

And it is further Ordered by this Court that this cause be, and the same is hereby, remanded to the said District Court with directions to correct the sentence imposed for violation of the Federal Escape Act so that it shall begin upon the expiration of or upon legal release from the sentence under which appellant was serving at the time of his attempted escape, to-wit: the one year sentence imposed by the United States District Court for the Western District of Arkansas.

APRIL 4, 1947.

60 In the United States Circuit Court of Appeals, Eighth Circuit

[Title omitted.]

Petition for rehearing

Filed April 15, 1947

Comes now the United States of America, the appellee herein, by its attorneys of record, Sam M. Wear, United States Attorney, and Earl A. Grimes, Assistant United States Attorney, and petition the Court for a rehearing of the above-entitled cause, for reasons, as follows:

1. The judgment is for the wrong party.

2. The judgment is unwarranted, the facts and the law with relation thereto considered.

3. The judgment and the opinion of the Court declaring the law in support thereof would, if permitted to stand, effectually operate to destroy the virility of the Statute, to wit; Section 753h, Title 18, U. S. C., under which the appellant was convicted.

61 4. The judgment is contrary to the provisions of the Statute.

5. The Court erred in its interpretation of the law as written in its opinion and mandate directing the trial court to correct the judgment and sentence.

6. The Court has misconstrued the meaning of the terms used by Congress in enactment of the Escape Act. The Act provides:

"If such person be under sentence at the time of such offense, the sentence imposed hereunder shall begin upon the expiration of, or upon legal release from, any sentence under which such person is held at the time of such escape or attempt to escape."

Such Act deals with kinds of sentences and not service of sentences.

In construing such provision of said Act, the Court has interpreted the word "any" to mean one singly. It has also interpreted "held" mean "served or serving." The Court by its interpretation of said Act has modified and changed the substantive Criminal Law relating to sentences and commitments. The literal meaning of the terms used in the Act permit of no such construction. The word "any," according to Webster's New International Dictionary, means: "One indifferently out of a number, no matter what one." At the time appellant in the case at Bar attempted to escape, he had been committed to the custody of the Attorney General of the United States under three cumulative sentences. At the time of his attempted escape, he was being "held" in custody of the Marshals who were transporting him to Leavenworth Penitentiary as representatives of the Attor-

ney General under the judgments and commitments assessing cumulative sentences. That he had begun to "serve" one of such sentences under one commitment is immaterial.

62 The Statute in question says nothing about a defendant serving a sentence. What the statute is concerned with is how the person escaping or attempting to escape is being held. The fact that the judgments and commitments under which appellant was being held at the time of his escape called for cumulative service of time does not militate against the fact that he was being "*held*" under the authority of each such judgment and commitment. He could not legally be released from the custody in which he was then held without satisfying service of time called for by such cumulative sentences. Which of such cumulative sentences he had begun to serve is not decisive for the mandate of the Statute is that he is subject to the penalties for escape or attempt to escape if he is held under "any sentence," and, literally interpreted, that means, no matter what one; one or the other.

"Held" is the present participle of "hold." The tense in which it is used in the Act in question expresses a mode or mood; and not quantity, length, or time. Such tense refers to the state in which a defendant is placed, and not to the length or time of the happening of such state. Hence, the word "held" as used in the Act cannot be said to refer to time nor be used as a synonym for serve, served, or serving, as the Court attempts to construe such word in its interpretation of the Act in question.

On page 3 of its opinion, the Court states:

"So that it conclusively appears that from the date of the imposition of the first sentence he was serving that sentence and hence, he was serving that sentence at the time he attempted to escape."

On page 4, the Court says:

"In the final analysis, it would seem that the question

63 determinative of the issue involved is whether at the time appellant attempted to escape he was, as the trial court said, 'being held under three sentences.'"

Thereupon, the Court proceeds to determine that because appellant had begun to serve the first sentence imposed upon him, that he was only "held" under that one sentence. Had Congress intended such a result, it would have used the verb "serving" in said Act instead of the verbal "held." On page 5 of its opinion, the Court says:

"The Federal Escape Act provides one rule where a person escapes from legal custody before conviction and another where a person is serving a sentence at the time of attempting to escape."

Such interpretation makes the word "serving" a synonym for "held." Serve, served, or serving are verbs indicative of action,

length, or time. A present participle used as a verbal never denotes length or time, but only a mode or mood. "Held" is such a present participle of hold.

To give interpretation to the Escape Act that the Court gives to it in its opinion nullifies such Act as a means for punishment of those who escape or attempt to escape from the legal custody of the Attorney General of the United States. When Congress passed such Act, it intended that a person who escaped or attempted to escape from the legal custody of the Attorney General of the United States, after having been sentenced by a court of competent jurisdiction for an offense or offenses, should be punished with additional punishment for such offense. Assume that appellant in the case at Bar had been given three five-year cumulative sentences. Under the Court's interpretation of the Act, appellant could have escaped during the service of his first sentence and the only punishment he would receive therefor would be
64 to serve five years' imprisonment concurrently with the second five-year cumulative sentence. Likewise, appellant could escape during service of his second cumulative sentence and the only punishment that could be meted out to him would be punishment to be served concurrently with his third five-year sentence so previously assessed. For each such escape appellant would receive no punishment, even though in attempting such escape he jeopardized the lives of the Marshals who "held" him in custody, as appellant did in the case at Bar. No such result was intended by Congress, because it used the word "held" in said Act, and not the word "serving," and it used the word "held" in such a tense as to make it apply to "any sentence" of a defendant.

Furthermore, the interpretation that this Court gives to the Escape Act reads into such Act a limitation not included by Congress. Such limitation nullifies and changes the whole philosophy and theory relative to sentences known to criminal jurisprudence and the power of courts to assess cumulative sentences. The great weight of authority and the universal rule insofar as Federal Criminal Jurisprudence is concerned is in favor of the proposition that a court has power derived from the common law to impose cumulative sentences on conviction on several offenses charged in separate indictments or in several counts of the same indictment, the imprisonment under one to commence at the termination of that of the other. 15 Am. Juris., page 121. The Escape Act as enacted by Congress was not intended to modify or change such rule of criminal procedure. The purpose Congress had in mind at the time of the enactment of the Escape Act, as manifest from the terms of the Act itself, was, that if one committed to legal custody for the commission of a criminal offense escaped or attempted to escape, he should be guilty of an offense and

65 the court in which such offense was tried, if such person was found guilty, could not assess a sentence so as to make the same run concurrent with the sentence that such escapee was then serving. In other words, the Escape Act only prevents a sentencing court from assessing a sentence which could be made to run concurrent with "any sentence" the escapee was being held at the time of escape, and did not change the law, anciently existing relating to cumulative sentence. There is no restriction in the Escape Act limiting the power of a sentencing court to sentence a defendant guilty of the violation of said Act to a term to begin after the service of the sentence he is then serving. The limitation is that a sentence assessed under such Act shall not begin to run until "expiration, or legal release from, any sentence under which such person is held at the time of such escape."

Wherefore, your movant prays the Court to grant a rehearing of the entitled cause.

SAM M. WEAR,
United States Attorney for the Western District of Missouri,
EARL A. GRIMES,
Assistant United States Attorney,
Attorneys for Appellee.

The undersigned, one of the attorneys of record for the appellee herein, does hereby certify that the within petition for rehearing is filed in good faith and with absolute confidence that it is meritorious, and that the petition should be granted.

SAM M. WEAR,
United States Attorney for the Western District of Missouri,
By EARL A. GRIMES,
Assistant United States Attorney.

[File endorsement omitted.]

66 IN UNITED STATES CIRCUIT COURT OF APPEALS

Order denying petition of Appellee for rehearing

April 25, 1947

Petition for rehearing filed by the appellee in this cause having been considered by this Court, It is now here Ordered that the same be, and it is hereby, denied.

APRIL 25, 1947.

67 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1947

Supreme Court of the United States

Order granting motion for leave to proceed in forma pauperis

October 13, 1947

On consideration of the motion of the respondent for leave to proceed herein in forma pauperis,

It is ordered by this Court that the said motion be, and the same is hereby, granted.

765697—47

Supreme Court of the United States

Order allowing certiorari

Filed October 13, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1947